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No. 00-1746

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

SHERRY THURMOND, LEVIN HALL, *et al.*,
Petitioners,

v.

DANIEL DELLA-CALCE, LIEUTENANT,
individually and in his official capacity as a Lieutenant
with the City of Huntsville Police Department,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF PETITIONER IN REPLY TO RESPONDENT'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE SUPREME COURT OF THE UNITED STATES

No. 00-1746

SHERRY THURMOND, et. al., PETITIONERS,

v.

DANIEL DELLA-CALCE, in his individual capacity and in his capacity

as a Lieutenant of the Huntsville Police Department, RESPONDENT.

BRIEF OF PETITIONER IN REPLY TO RESPONDENT'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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1. The Only Effect of the Court's Decision in *Saucier v. Katz* Is to Warrant Remand of this Case to Review Respondent's Qualified Immunity Defense under the *Saucier* Court's Two Part Analysis.

Petitioners maintain that this case presents an unresolved constitutional question regarding the meaning of "clearly established law" under the qualified immunity doctrine. The Court may find, however, that resolving that question is premature, since the court below failed to analyze whether respondent's conduct violated petitioner's Fourth Amendment right to be free from excessive force under the multi-factor

analysis articulated in *Graham v. Connor*, 490 U.S. 386 (1989), and mandated by the Court's intervening decision in *Saucier v. Katz*, 533 U.S. __, 121 S.Ct. 2151 (2001). Implicit in petitioners' Questions Presented is the fairly included question of whether a qualified immunity analysis may proceed without an initial determination of whether a constitutional right has been violated. *See discussion, petition for cert.* at 18-25. *Saucier* resolved that question by holding that the mandatory first step of any qualified immunity analysis is a determination of whether a plaintiff has made the requisite showing of a deprivation of a constitutional right.

The inquiry required by *Saucier* simply did not occur in this case. Although petitoners maintain that complete review of the Questions Presented in this case is warranted, the Court may elect to grant the instant petition and remand this matter to the court below so that it may review this case through the prism afforded by the Court's decision in *Saucier*. *See, e.g., Coffey v. McNair*, 234 F.3d 352 (7th Cir. 2000), *cert. granted, vacated*, 533 U.S. __ (June 25, 2001) (vacated and remanded in light of *Saucier v. Katz*).

II. The Questions Presented in the Petition for Writ of Certiorari Remain Unresolved in the Wake of the Court's Decision in *Saucier v. Katz*.

The Questions Presented in this case clearly remain unresolved by the Court's holding in *Saucier*. *Saucier* cannot be read in any way as confirmation of the Eleventh Circuit's definition of "clearly established law" in the qualified immunity context. That standard requires that pre-existing, binding case

law[1] prohibits the conduct in question in a factual context so similar that it compels a reasonable officer to know and understand his or her conduct to be unlawful. *See, e.g., Lassiter v. Alabama A & M University*, 28 F.3d 1146, 1150 (11th Cir. 1994) (*en banc*). While *Saucier* may provide a means of disposing of this case short of argument on the merits, it by no means affirms the Eleventh Circuit's qualified immunity analysis. Indeed, the *Saucier* ruling lends additional credence to petitioners' contention that the Eleventh Circuit's disposition of these claims is at odds with controlling precedent.

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[1] Note that the usage 'binding precedent' in reference to the Eleventh Circuit's conception of 'clearly established law' is considerably narrower than the commonly understood meaning of binding precedent. The Eleventh Circuit standard does not consider federal district court decisions or inferior state court decisions to be clearly established law for qualified immunity purposes, even though they would constitute binding precedent under virtually any other question concerning the rule of law. *Jenkins ex. rel. Hall v. Talladega City Board of Education*, 115 F.3d 821, 827 n. 4 (11th Cir. 1997) (*en banc*), *cert. denied*, 522 U.S. 966 (1997) ("In this circuit, the law can be 'clearly established' for qualified immunity purposes only by decisions of the U.S. Supreme Court, Eleventh Circuit Court of Appeals, or the highest court of the state where the case arose."). This Court has indicated that such an approach is improper, but has not so held expressly. *Wilson v. Layne*, 526 U.S. 603, 617 (1999) ("Petitioners have not brought to our attention any cases of controlling authority in their jurisdiction . . . which clearly established the rule on which they seek to rely, nor have they identified a consensus of cases of persuasive authority such that a reasonable officer could not have believed his actions were lawful.").

III. The Eleventh Circuit's Opinion in *Smith v. Mattox* Fails to Reconcile the Circuit's Qualified Immunity Jurisprudence with that of This Court.

Contrary to respondent's claims, *Smith v. Mattox*, 127 F.3d 1416 (11th Cir. 1997), fails to reconcile the Eleventh Circuit's flawed qualified immunity analysis with Supreme Court jurisprudence. As the *Saucier* decision makes clear, the substantive analysis in *Mattox* is not a reliable or adequate substitute for an inquiry under *Graham* into the existence of a constitutional right, for *Mattox* does not incorporate *Graham*'s substantive test for whether an excessive force claim has been properly alleged. Indeed, *Mattox* only proscribes conduct so obvious that *Graham*'s factual inquiry is unnecessary, a standard impossible to meet in a case that is even marginally complex or novel. This very concern was one of the rationales behind the *Saucier* decision:

> A court required to rule upon the qualified immunity issue must consider, then, this threshold question: taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right? This must be the initial inquiry. In the course of determining whether a constitutional right was violated on the premises alleged, a court might find it necessary to set forth principles which will become the basis for a holding that a right is clearly established. This is the process for the law's elaboration from case to case, and it is one reason for our insisting upon turning to the existence or nonexistence of a constitutional right as the first inquiry. The law might be deprived of this explanation were a court simply to skip ahead to the question

> whether the law clearly established that the officer's conduct was unlawful in the circumstances of the case.

Saucier, 533 U.S. __, 121 S.Ct. 2151, 2156 (internal quotations omitted).

The decision below is a poignant example of the very danger articulated by the Court. Without considering whether a constitutional violation occurred, the court found no clearly established law proscribing respondent's conduct, and rejected the district court's finding under *Mattox* of a nonetheless "obvious" constitutional violation. *Petition for cert.* at 5a. Such 'skipping' of the first inquiry under *Saucier* is routine in the Eleventh Circuit. *See discussion, petition for cert.* at 20-23.[2] The *Mattox* exception is simply the by-product of a flawed analytical approach which fails to reconcile Eleventh Circuit jurisprudence with the two step inquiry of *Saucier*.

Conclusion

The petition for writ of *certiorari* should be granted, or in the alternative *certiorari* should be granted for the purpose of remanding this case for further proceedings in light of *Saucier v. Katz*.

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[2] In *Powers v. CSX Transportation*, 105 F.Supp.2d 1295, 1304 (S.D. Ala. 2000), the court provides an overview of the Eleventh Circuit's reluctance in *Bivens*-type constitutional tort cases to determine whether a constitutional right exists before disposing of a case on the grounds that the alleged right was not "clearly established." *C.f. Bivens v. Six Unknown Narcotics Agents*, 403 U.S. 388 (1971).

Respectfully submitted,

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